3-5000-21958-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE HENNEPIN COUNTY MEDICAL CENTER

In the Matter of the Proposed Discharge of Carl D. Ostling from Hennepin County Medical Center	**FINDINGS OF FACT, CONCLUSIONS AND ORDER**

The above entitled matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on June 29-30, 2011, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota. The OAH record closed on July 27, 2011, upon receipt of post-hearing memoranda.

Martin D. Munic, Senior Assistant Hennepin County Attorney, 2000A Government Center, 300 South Sixth Street, Minneapolis, MN 55487, appeared for the Hennepin County Medical Center (HCMC).

Bruce P. Grostephan, Attorney at Law, Peterson, Engberg & Peterson, 400 Second Avenue South, Suite 700, Minneapolis, MN 55401, appeared for Carl D. Ostling (Veteran).

HCMC does not have a civil service board, commission, or merit system authority. Under the Veterans Preference Act (VPA), Minn. Stat. § 197.46, when there is no civil service board, commission, or merit system authority, a hearing on the proposed discharge of a veteran is to be held by an ad hoc three-person board. Instead of using a three-person board, the parties in this case stipulated to having this appeal heard by an Administrative Law Judge from the Office of Administrative Hearings. They further agreed that the decision of the Administrative Law Judge shall be final, subject only to appeal to the district court, and subsequently to the appellate courts, as provided in the VPA.[1]

STATEMENT OF ISSUE

The issue presented is whether the HCMC may discharge the Veteran for incompetency or misconduct as provided in the Veterans Preference Act, Minn. Stat. § 197.46 (2010).[2]

The Administrative Law Judge concludes that the Veteran's violation of attendance policies and interpersonal conduct policies amount to misconduct and that the proposed termination of his employment should be affirmed.

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[1] Stipulation of the Parties (March 9, 2011).
[2] All references to Minnesota Statutes are to the 2010 edition.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Carl D. Ostling served in the U.S. Air Force from July 1983 to October 1984. While in the military he received basic military training along with training as a medical service specialist. He received a general discharge under honorable conditions and is entitled to the protections and benefits of the Veterans Preference Act (VPA).[3]

2. HCMC is a public employer within the meaning of the VPA.

3. HCMC hired Mr. Ostling as a paramedic in 1988. Between 1993 and 2010, Mr. Ostling's overall ratings on performance evaluations reflected that he did his work as a paramedic competently.[4] During his career he was repeatedly disciplined, however, for violating policies relating to attendance, unscheduled absences, and personal conduct. HCMC proposed to terminate his employment on January 7, 2011, for violation of these policies.[5]

4. HCMC is responsible for processing 911 calls for emergency assistance in its primary service area, which includes Minneapolis and 14 communities in Southern Hennepin County. In 2010, HCMC received 57,000 calls requesting an ambulance response to some type of crisis situation. Approximately 41,000 of those calls resulted in transporting a patient to a hospital. To provide coverage 24 hours per day, seven days per week, HCMC employs approximately 113 paramedics and has, on average, 25 scheduled shifts per day.[6]

5. The scheduling of shifts is a complex process shared by HCMC management and the Hennepin County Association of Paramedics and EMTs, the union that represents paramedics. Based on historical data, the HCMC director of Emergency Medical Services (EMS) makes a determination in June of each year as to the number of paramedics that will be needed each day of the following year. These numbers are then provided to the EMS operations manager, who meets with a committee (including union representatives) to provide input into the schedule. The shift requirements are finalized and are posted for bid in October of each year. Paramedics then bid for shifts during the coming year based on their seniority.[7]

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[3] *See* Ex. 2. Mr. Ostling's discharge papers indicate that the reason for separation was "Misconduct—other serious offenses." According to Mr. Ostling, the misconduct involved drinking, disobeying orders, getting into arguments with superior officers, and attendance issues. HCMC does not dispute that Mr. Ostling's general discharge under honorable conditions is a "separation under honorable conditions" that qualifies him for protection under the VPA. *See* Minn. Stat. § 197.447.

[4] Ex. V-4. The exhibits offered by the Veteran and received in evidence are marked as Ex. V-1, Ex. V-4 through Ex. V-7, and Ex. V-9 through Ex. V-18.

[5] Ex. 1. The exhibits offered by HCMC and received in evidence are marked as Ex. 1 through Ex. 26.

[6] Testimony of Martin Van Buren.

[7] *Id.*; *see also* Ex. V-1 (Labor Agreement) at p. 11.

6. The purpose of having so many shifts each day is to ensure that there are enough paramedics working at any given time to allow ambulance crews to respond to emergency calls. Management of shift changes is a challenging and complex process each day. If there are not enough paramedics to cover a particular shift, management may ask for voluntary overtime or may require mandatory overtime, depending on the situation.[8] Accordingly, reporting to work on time and maintaining job standards for attendance are part of the paramedic job description.[9]

7. Because of the complexity of shift scheduling, unscheduled absences are highly disruptive to EMS operations. As a result, HCMC has detailed policies addressing unscheduled absences, including the amount of notice required for use of sick time, the number of unscheduled absences to be used during the year, the amount of notice required when a paramedic expects to be late for work, and the consequences of failing to appear when scheduled.[10]

8. At all relevant times, HCMC has had a progressive discipline policy providing that discipline for attendance violations will be applied sequentially, generally beginning with a verbal reprimand and progressing to a written reprimand, suspension, and dismissal or demotion for similar violations occurring within six months of the previous discipline.[11] A discussion or verbal reprimand "starts the clock," so to speak; and if enough time passes without a recurring violation, the clock is "re-set" back to the beginning of the disciplinary sequence. The particular timeframes and starting points for each type of violation are contained in the HCMC Policy and Procedure Manual, which is revised periodically.[12]

9. In 2010, for example, HCMC's policy defined an unscheduled absence as any absence not approved in advance. An employee's use of sick leave typically requires notice to the supervisor at least two hours prior to the start of the shift, so that arrangements can be made to cover the absence.[13] It is a violation of the attendance policy to have three or more unscheduled absences within three months, or six or more occurrences during 12 months, and discipline for violating this policy begins with a verbal reprimand. A paramedic who is unexpectedly tardy or "late to work" must also contact a supervisor prior to the start of the shift to indicate when the paramedic expects to be there, so a decision can be made whether to ask for or require overtime coverage from someone else. Discipline for being late to work also starts with a verbal reprimand.[14]

10. The 2010 policy defined a "no call, no show" as the employee's failure to appear for a scheduled shift without contacting a supervisor prior to the start of the shift.

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[8] Test. of M. Van Buren; Testimony of Doug Gesme; Ex. V-1 at pp. 11-12.
[9] *See, e.g.*, Ex. 3.
[10] *See* Ex. 5; Ex. 6.
[11] *See, e.g.*, Test. of M. Van Buren and Ex. V-1 at p. 24.
[12] See, e.g., Ex. 5 (attendance expectations policy from 2000 Policy and Procedure Manual); Ex. 7 (attendance expectations policy effective Nov. 5, 2007).
[13] See, e.g., Ex. V-1, Art. 19, section 3 G at p 16.
[14] Ex. 6.

A "no call, no show" is particularly disruptive because the employer lacks advance notice and has limited ability to seek voluntary overtime, if that would be necessary to cover the absence.[15] Discipline for a "no call, no show" begins with a verbal reprimand. Subsequent occurrences within six months of a verbal reprimand will lead to a written reprimand; occurrences within six months of receiving a written reprimand will lead to an eight-hour suspension; and occurrences within six months of a written reprimand are subject to other progressive discipline, including termination.[16]

11. HCMC encourages employees who have problems with substance abuse to voluntarily disclose their problems before becoming involved in disciplinary proceedings. As provided in the Labor Agreement between HCMC and the union, an individual who does so will be granted the needed time off for treatment, rehabilitation, or counseling in accordance with the current agreement. Moreover, the disclosure that a member of the union is chemically dependent will not be used as a sole basis for discipline. If the employer has reasonable cause to believe that an employee is chemically dependent, the employer may refer the employee to the HCMC Employee Assistance Program. The employee may, in the alternative, elect to secure a required evaluation by a qualified professional of the employee's choice.[17]

12. In 2002, Daniel Shively was president of the paramedic's union. Mr. Shively was a friend and former partner of Mr. Ostling's. In 2002, Mr. Shively became concerned about Mr. Ostling's use of alcohol and feared that Mr. Ostling's depression, marital problems, and alcohol use might cause him to harm himself. Mr. Shively proposed an intervention aimed at bringing Mr. Ostling to in-patient chemical dependency treatment and sought support from Martin Van Buren, who was at that time the assistant manager of EMS. Mr. Van Buren gave his "blessing and support" to Mr. Shively's proposal and advised Mr. Shively that he could have as much time off as needed in order to plan and effectuate the intervention and that leave for Mr. Ostling to participate in treatment would be granted. The intervention was not successful. Mr. Ostling refused to participate in the planned treatment, although he advised Mr. Shively that he would quit drinking on his own. The intervention also caused the dissolution of the friendship between Mr. Shively and Mr. Ostling. The two men did not speak to each other for many years.[18]

13. Between November 2001 and July 2002, Mr. Ostling received progressive discipline for failure to comply with the sick leave policy. The discipline began with a verbal reprimand and ended with a two-shift suspension.[19] At the time of the two-shift suspension, the assistant EMS director offered Mr. Ostling a medical leave of absence

[15] Testimony of Doug Gesme. In 2011, the HCMC policy apparently was changed to allow a ten-minute grace period after the start of a shift. *Id*.
[16] *See* Ex. 6. Under a previous policy in effect through November 2007, discipline for a no call, no show began with a written reprimand. *See* Ex. 5.
[17] Ex. V-1, Art. 38, section 1, p. 27.
[18] Testimony of Daniel Shively. Mr. Shively could not recall when in 2002 this intervention took place, but he did recall that Mr. Ostling was not facing any discipline at the time.
[19] Ex. 25 at pp. 20-27 (verbal reprimand, Nov. 26, 2001; written reprimand, Feb. 14, 2002; one-shift suspension, June 28, 2002; two-shift suspension, June 30, 2002) .

so that he could deal with any personal issues that could have been affecting his attendance. Mr. Ostling declined the offer, saying it was not necessary but that he intended to seek assistance from a counselor. The notice of his suspension included a warning that continued noncompliance would result in a five-day suspension with intent to terminate his employment.[20]

14. Between February 2007 and March 2008, Mr. Ostling received progressive discipline for being late to work on four occasions, each violation occurring within six months of the previous one. The discipline began with a verbal reprimand and ended with a two-shift suspension.[21] Mr. Ostling also received a written reprimand for calling in sick with less than two hours notice to his supervisor.[22]

15. On November 25, 2009, Mr. Ostling received a verbal reprimand for being late for his shift.[23]

16. On the evening of December 14, 2009, Mr. Ostling called a patient representative phone number at HCMC and left a message complaining about the co-pay on a bill for services he had received as a patient in the emergency department. He was intoxicated at the time. In the message Mr. Ostling identified himself as a person "unfortunately" employed as an HCMC paramedic. He was agitated, and he characterized HCMC in a derogatory manner. He used profanity and threatened to tell patients not to come for treatment at the HCMC emergency department. The taped message was forwarded to Doug Gesme, the EMS operations manager.[24]

17. On December 16, 2009, Mr. Gesme met with Mr. Ostling, a union representative, and a supervisor to discuss the incident. Mr. Ostling stated that he left this message after a collection agency had contacted him about paying the bill. That evening, Mr. Ostling came to Mr. Gesme's office by himself and asked to speak privately. He acknowledged leaving the message and apologized for his conduct. He stated that he did not remember much about the message because he was intoxicated at the time. He stated that he had contacted a counselor, who recommended a formal treatment program. Mr. Ostling subsequently advised Mr. Gesme, on January 6, 2010, that he had begun an out-patient chemical dependency treatment program.[25]

18. The HCMC EMS discipline policy for interpersonal conduct and demeanor provides that:

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[20] Test. of M. Van Buren; Test. of D. Gesme; Ex. 25 at p. 21; Ex. 26. HCMC did not rely on the discipline issued in 2002 in its Notice of Intent to Terminate. This finding is included in the report only because the 2002 suspensions are relevant to the Veteran's argument that HCMC disciplined another employee, D.P., more leniently for the same type of violation.

[21] Ex. 7 (verbal reprimand, Feb. 2, 2007); Ex. 8 (written reprimand, July 3, 2007); Ex. 10 (one-day suspension, Oct. 9, 2007); and Ex. 12 (two-day suspension, March 11, 2008).

[22] Ex. 9 (written reprimand, Aug. 4, 2007).

[23] Ex. 4 at p. 2.

[24] Test. of D. Gesme; Ex. 13.

[25] *Id.*

> Employees are expected, at all times, to behave in an ethical and professional manner, which positively reflects on the department. Conduct, which is below this department standard, will result in discipline ranging from a Verbal Warning to Termination.[26]

19. In response to this incident, Mr. Ostling received a 24-hour (three-shift) suspension. Because Mr. Ostling had enrolled in an out-patient treatment program, he was not required to contact the EAP or to attend an anger management program. He was warned that future incidents of a similar nature, incompetence, or misconduct might result in progressive discipline, including termination.[27]

20. Mr. Gesme was supportive of Mr. Ostling's enrollment in out-patient chemical dependency treatment. Mr. Gesme viewed this as a positive step for Mr. Ostling, and he advised Mr. Ostling that he could have time off for treatment and that he would accompany Mr. Ostling to Alcoholics Anonymous (AA) meetings if Mr. Ostling so desired. In a subsequent performance evaluation, Mr. Gesme commended Mr. Ostling's initiative in addressing his personal problems.[28]

21. On May 19, 2010, Mr. Ostling's supervisor had a discussion with him regarding an infraction of payroll policy in that he had incorrectly entered his time for May 3, 2011, as vacation time rather than sick time.[29]

22. On May 23, 2010, Mr. Ostling received a verbal reprimand for unscheduled absences (sick time) on February 20, March 31, April 16, April 20, and May 3, 2011. Four of the five absences were on the first or last day of a scheduled series of shifts. As noted above, the policy called for fewer than three absences in three months and no more than six absences in 12 months.[30]

23. On May 28, 2010, Mr. Ostling received a verbal reprimand for failing to appear for a shift on that date (no call, no show). His shift was scheduled to start at 5:00 a.m., and Mr. Ostling called at 5:05 a.m. to say that he had overslept. Because extra staff was available to cover his absence, he was given the day off.[31]

24. On June 7, 2010, Mr. Ostling received a verbal reprimand for another payroll error involving the failure to use vacation time for a planned day off.[32]

25. On July 10, 2010, Mr. Ostling was on duty when he mocked a gay co-worker who passed him in the hallway by addressing the co-worker and using a Popsicle to mimic a sexual act. This occurred in front of four other paramedics. A witness reported the incident to a duty supervisor. Mr. Ostling acknowledged making the comments and gestures in question but indicated he did not mean to be hurtful and

[26] Ex. 13.
[27] Ex. 13.
[28] Test. of C. Ostling; Ex. 14.
[29] Ex. 15.
[30] Ex. 16.
[31] Ex. 17.
[32] Ex. 18.

intended it only as a joke. He was remorseful and indicated he wished to apologize to the co-worker.[33]

26. Based on this incident, EMS management concluded Mr. Ostling violated the interpersonal conduct and demeanor policy and the harassment and discrimination policy. He received a written reprimand, providing that "[w]hile the factors involved in this incident and those leading to your previous suspension may be different, you have clearly established a pattern of inappropriate behavior that you must correct immediately if you are to remain an employee" of HCMC. He was advised that future incidents of a similar nature, incompetence, or misconduct could result in progressive discipline, including termination of employment.[34]

27. On August 19, 2010, after a five-day drinking binge, Mr. Ostling went to the St. Croix Regional Medical Center with tachycardia and chest pain. He was admitted for one night and discharged the next day with new prescriptions for anti-depressant and anti-anxiety medications. He was warned that the anti-anxiety medication could make him sleepy and that he should avoid activities that require concentration when taking the medication.[35] Mr. Ostling did not at that time advise anyone at HCMC of his relapse, his hospitalization, or his use of the new medications.[36]

28. Mr. Ostling sought and obtained a refill of the anti-anxiety medication on August 24, 2010.[37]

29. On September 6, 2010, Mr. Ostling appeared five minutes late for his shift, without prior notice. He said he had fallen asleep in his car in the parking ramp at HCMC. He received a written reprimand for a no call, no show. This was the second occurrence within six months, the previous one being May 28, 2010.[38]

30. On September 15, 2010, Mr. Ostling visited an alcohol abuse counselor at St. Croix Regional Medical Center. According to her notes, his treatment plan included stopping the use of anti-anxiety and anti-depressant medications that day.[39]

31. On September 30, 2010, Mr. Ostling was 27 minutes late for his shift when he called his shift supervisor to say that he had again fallen asleep in his car in the parking ramp. This was the third no call, no show in the previous six months. Mr. Ostling received a one-shift suspension. His supervisor also provided him with the contact information for the EAP.[40]

32. On October 1, 2010, Mr. Ostling again visited the St. Croix Regional Medical Center to discuss his efforts to quit smoking and drinking. He advised the

[33] Ex. 19; Ex. 20.
[34] *Id.*
[35] Ex. V-10.
[36] Test. of C. Ostling.
[37] Ex. V-10.
[38] Ex. 21.
[39] Ex. V-10.
[40] Ex. 22.

provider that he had been using Ambien for insomnia but that it made him too sleepy and he did not want to use it any more. He stated he would dispose of the medication by giving it to his AA sponsor. He stated that he had used the last of his anti-anxiety medication on September 28, 2010, and that he did not want any more of it. He said he had been sober since August 19, 2010, and had been attending AA regularly.[41]

33. On November 10, 2010, Mr. Ostling visited the St. Croix Regional Medical Center seeking medications for back pain. He requested oxycodone, a narcotic pain reliever, but the physician gave him instead an anti-inflammatory and a muscle relaxant.[42] Later the same day, Mr. Ostling visited a different physician in Osceola, Minnesota. Mr. Ostling withheld the information about his alcohol abuse, and he succeeded in obtaining prescriptions for oxycodone and cyclobenzaprine, a muscle relaxant.[43]

34. On November 25, 2010, Mr. Ostling failed to appear for his scheduled shift without calling in advance. His supervisor found him sleeping in his car in the parking ramp. He punched in for his shift two hours late. This was the fourth no call, no show since May 2010.[44] Mr. Ostling was not using any medications on this day.[45]

35. Mr. Ostling was aware that this incident could result in termination under the progressive discipline policy. In a meeting on December 3, 2010, Mr. Ostling informed EMS management for the first time of his relapse in August, his hospitalization, and his use of other medications (Ambien, the anti-depressant, and the anti-anxiety medication) that had made him drowsy. He also stated that he was in the middle of a divorce and was concerned about losing his house. He indicated he did not need a new start time, because for 2011 he had bid a later shift. Mr. Ostling further stated that he had not used alcohol since his hospitalization in August and that he was attending AA meetings.[46] Mr. Ostling did not request a medical leave for in-patient treatment during this meeting.[47] EMS management accepted Mr. Ostling's representations that he had maintained sobriety since the August relapse.[48]

36. On December 5, 2010, Mr. Ostling filed a first report of injury for worker's compensation purposes, stating he had injured his lower back from lifting a patient down some stairs.[49]

37. On January 7, 2011, HCMC provided to Mr. Ostling notice of intent to dismiss him. The notice relied on Mr. Ostling's disciplinary record from 2007 forward, as well as ten occurrences of unscheduled absences totaling 17 days during 2010, 12

[41] Ex. V-10.
[42] Ex. V-10.
[43] Ex. V-17; Test. of C. Ostling.
[44] Ex. 23.
[45] Test. of C. Ostling.
[46] Ex. 23.
[47] Test. of C. Ostling; Test. of D. Gesme. During the hearing, Mr. Ostling testified that he was not taking any medications on November 25, 2010, but he had gone back to drinking.
[48] Test. of D. Gesme.
[49] Ex. V-9.

of which occurred on the first scheduled day of a series of shifts and/or a weekend day. Mr. Ostling was put on a paid suspension pending the outcome of this contested case.[50]

38. On January 12, 2011, Mr. Ostling attended an administrative (Loudermill) hearing with HCMC. His attorney attended with him. At the hearing, he contended the employer should have offered him a change in schedule before dismissing him. He did not request a medical leave to attend in-patient treatment. The dismissal was upheld.[51]

39. On February 8, 2011, Mr. Ostling entered an in-patient chemical dependency treatment program at Fairview Recovery Services. He was discharged on February 28, 2011.[52]

40. On March 2, 2011, Mr. Ostling entered into an agreement with the Health Professionals Services Program, in which he agreed to active monitoring and frequent participation in recovery activities such as AA. He also agreed to enter into a phase II aftercare program.[53]

41. On March 30, 2010, Mr. Ostling was attending a continuing education program at HCMC. He spoke privately with Mr. Van Buren and Mr. Gesme. He apologized to both of them for his conduct and advised them that their decision to terminate his employment had saved his life. They congratulated him on his progress but indicated that the decision to discharge him was necessary and appropriate and would not be changed.[54]

42. June 9, 2011, Mr. Ostling completed his phase II aftercare program.[55]

43. At the time of the hearing, Mr. Ostling was attending AA meetings every night and attending church daily. He had re-established a relationship with his son.[56] Mr. Ostling's AA sponsor believes Mr. Ostling is doing everything necessary to maintain sobriety. He has consistently attended AA meetings and is actively involved in the program. Mr. Ostling's chemical dependency counselor at Fairview found him to be a punctual, willing participant who made good progress in treatment. With the completion of the phase II aftercare, he believes Mr. Ostling has a good prognosis.[57]

Based upon the foregoing Findings of Facts, the Administrative Law Judge makes the following:

[50] Ex. 1.
[51] Ex. 24.
[52] Ex. V-15; Ex. V-11.
[53] Ex. V-12.
[54] Test. of C. Ostling; Test. of M. Van Buren; Test. of D. Gesme.
[55] Ex. V-13.
[56] Test. of C. Ostling.
[57] Testimony of T.T.; Testimony of B.B.

CONCLUSIONS

1. Pursuant to Minn. Stat. §§ 14.50 and 197.46, and the Stipulation of the Parties, the Administrative Law Judge has the authority to determine whether HCMC's proposed discharge of the Veteran should be affirmed.

2. The Petitioner is a veteran who received a general discharge under honorable conditions within the meaning of the VPA.[58]

3. HCMC is a political subdivision of the State of Minnesota within the meaning of the VPA.[59]

4. The parties have complied with all relevant procedural requirements of statute and rule and this matter is properly before the Administrative Law Judge.

5. Minn. Stat. § 197.46 provides in part:

> No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.
>
> Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge. The failure of a veteran to request a hearing within the provided 60-day period shall constitute a waiver of the right to a hearing. Such failure shall also waive all other available legal remedies for reinstatement.

6. Minnesota courts have concluded that "[t]he cause or reason for dismissal must relate to the manner in which the employee performs his duties, and the evidence showing the existence of reasons for dismissal must be substantial."[60]

7. The employer bears the burden to show by a preponderance of the evidence that its disciplinary action is reasonable.[61] Factors that may be considered in this regard include "the veteran's conduct, the effect upon the workplace and work environment, and the effect upon the veteran's competency and fitness for the job."[62]

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[58] *See* Minn. Stat. § 197.447.
[59] *See* Minn. Stat. § 197.46.
[60] *Leininger v. City of Bloomington,* 299 N.W.2d 723, 726 (Minn. 1980), *quoting Ekstedt v. Village of New Hope*, 292 Minn. 152, 161-63, 193 N.W.2d 821, 826 (1972).
[61] *In the Matter of the Termination of Employment of Schrader,* 394 N.W.2d 796, 802 (Minn. 1986), *rehearing denied* (Nov. 21, 1986).
[62] *In re Schrader,* 394 N.W.2d at 802.

8. If the employer's action is reasonable, the discipline can be modified only if there are extenuating circumstances, which must be supported by substantial evidence.[63]

9. HCMC has demonstrated that the decision to terminate Mr. Ostling's employment was reasonable.

10. There is not substantial evidence of extenuating circumstances demonstrating that the discipline should be modified.

Based upon the foregoing Conclusions, and for the reasons explained in the Memorandum attached hereto, the Administrative Law Judge makes the following:

ORDER

IT IS ORDERED THAT: The proposed discharge of Mr. Ostling is AFFIRMED.

Dated: September 27, 2011

s/Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Digitally Recorded; No Transcript Prepared

NOTICE

This Report constitutes the final decision in this matter. The veteran may appeal from the decision pursuant to Minn. Stat. § 197.46.

MEMORANDUM

Under the Veterans Preference Act, no qualified veteran holding a position in public employment "shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing."[64] The term "misconduct" under the VPA has the same meaning as "just cause" for the discharge of a municipal employee under Minn. Stat. § 44.08, subd. 1: any cause "touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office."[65] It is also well established that "[t]he cause or reason for dismissal must relate to the manner in which the employee performs his duties, and the evidence showing the existence of reasons for dismissal must be substantial."[66] Misconduct may include the failure to adhere to

[63] *In re Schrader,* 394 N.W.2d at 802.
[64] Minn. Stat. § 197.46.
[65] *Leininger*, 299 N.W.2d at 726.
[66] *Id.*

significant rules and regulations that render the person unfit to perform the required duties of the position.[67]

The purpose of a hearing is not merely to review findings and approve or disapprove the recommended sanction, but to determine, based on the evidence, what penalty, if any, is justified. The authority to modify the discipline proposed by the employer is consistent with granting the veteran a meaningful hearing and ensuring that the employer does not arbitrarily abuse its power.[68] The employer bears the burden to show by a preponderance of the evidence that its conduct was reasonable.[69] To determine whether the City acted reasonably, one must consider "the veteran's conduct, the effect upon the workplace and work environment, and the effect upon the veteran's competency and fitness for the job."[70] Under applicable case law, the discipline that the employer imposed on the veteran may be modified if the employer acted unreasonably or if there are extenuating circumstances that demonstrate the disciplinary sanction should be modified.[71]

In this case, HCMC established that its attendance policies are important to the effective management of the emergency medical service and consequently to public safety. From 2007 through 2010, Mr. Ostling was disciplined multiple times for chronically violating attendance policies. In 2010, he had four no call, no shows; he also had ten occurrences of unscheduled absences totaling 17 days. He was also disciplined twice in 2010 for violating interpersonal conduct rules: leaving a profane and abusive message for a patient representative, after identifying himself as a paramedic, and threatening to take action that would undermine the financial health of his employer; and mocking a gay co-worker. Given the volume of discipline issued to Mr. Ostling in 2010, and his persistent failure to respond to discipline in the past by making permanent changes in his behavior, the employer elected to discharge him.

The Administrative Law Judge concludes, based on the record as a whole, that the employer's decision to discharge Mr. Ostling was consistent with its policies; the misconduct at issue relates to the manner in which Mr. Ostling performed his duties; and the evidence demonstrating the misconduct is both substantial and for the most part undisputed. Considering the conduct at issue and the effect upon the workplace and work environment, the discipline was reasonable.

The Veteran advances a host of arguments as to why the decision should be considered unreasonable, or in the alternative, arguments as to extenuating circumstances that he maintains provide cause to modify the sanction.

First, the Veteran points out that he received "fully competent" overall ratings on performance evaluations from 1993 through 2010, with the exception of 2007.[72] The

[67] *Leininger*, 299 N.W.2d at 727.
[68] *In re Schrader,* 394 N.W.2d at 800-01.
[69] *In re Schrader,* 394 N.W.2d at 802.
[70] *In re Schrader,* 394 N.W.2d at 801-02.
[71] *In re Schrader*, 394 N.W.2d at 802.
[72] In 2007, the Veteran's overall performance rating was "Needs Improvement." *See* Ex. V-4.

Administrative Law Judge agrees that Mr. Ostling's overall performance ratings were generally acceptable; but the evaluations also reflect, in almost every year, that he had failed to comply with sick leave policies and was given objectives to monitor sick time usage, report to work on time, conduct himself professionally at all times, or monitor his interactions with other staff members.[73] The fact that Mr. Ostling was technically proficient in his job does not overcome his failure to comply with important policies pertaining to attendance and behavior. In this case, it is not an extenuating circumstance that would justify a reduced sanction.[74]

Second, the Veteran argues that, because the HCMC EMS medical director has confidence in his skills as a paramedic and is willing to work with him, the decision to terminate his employment is unreasonable. The HCMC EMS medical director is the licensed professional responsible for all medical care provided by all paramedics. Dr. Mahoney did testify that he has no concerns about Mr. Ostling's competence as a paramedic and that he remained willing to assume the medical responsibility for Mr. Ostling's work, should he return to the job. But Mr. Ostling's medical skills are not at issue. And Dr. Mahoney is not Mr. Ostling's employer, does not work for Mr. Ostling's employer, and is not responsible for making disciplinary decisions with regard to a paramedic's adherence to employment standards. Dr. Mahoney's willingness to continue working with Mr. Ostling does not render unreasonable the employer's decision to discharge Mr. Ostling for misconduct pertaining to attendance and behavior, nor is it an extenuating circumstance that provides reason to modify the disciplinary sanction.

Third, the Veteran argues that the decision was unreasonable because HCMC has applied its attendance policies differently to him than it did to D.P., another paramedic. The record reflects that between May 25, 1996, and May 31, 1997, D.P. was late to work five times and received progressive discipline beginning with a verbal reprimand and ending with a two-shift suspension. HCMC took no action to terminate D.P.'s employment. On one of those occasions, D.P. was 45 minutes late to work, but no disciplinary action was taken. In later years, between October 2007 and May 2008, D.P. again received progressive discipline for four violations of the attendance policy, ranging from a verbal reprimand to a two-shift suspension. At some point D.P. bid into another shift that helped to mitigate his attendance problems. The Veteran argues, based on D.P.'s record, that he should have received another two-shift suspension in response to the incident on November 25, 2010, instead of being terminated.

Although it is unclear why D.P. received no discipline for one incident of tardiness, it is absolutely clear that the 1996 (one-shift) and 1997 (two-shift) suspensions were the first suspensions on D.P.'s disciplinary record (dating back to

[73] Ex. V-4.

[74] See *Wagner v. Minneapolis Public Schools*, 569 N.W.2d 529, 532 (Minn. 1997) (otherwise good work record is not the basis for an extenuating circumstance that would justify reducing the sanction for specific instances of misconduct); *Hagen v. State Civil Service Bd.*, 282 Minn. 296, 299, 164 N.W.2d 629, 632 (1969) (sleeping on duty sufficient cause to support discharge).

March 1985).[75] Moreover, it is unclear what the HCMC policy was in that timeframe; there is no way to determine whether this disciplinary action reflected a policy in effect at the time, but which may have changed since then.[76] In addition, approximately ten years passed between the 1996-97 discipline and the next series of suspensions in 2007-2008.

Mr. Ostling's disciplinary record is different than D.P.'s. At the time of the discharge decision, Mr. Ostling had been repeatedly disciplined and suspended in 2002 and in 2008 for violating attendance policies, and he had already received both a three-day suspension and a written warning in 2010 for violating the interpersonal conduct policy. Under the policy applicable in this case, the corrective action for additional attendance violations occurring within six months of a one-shift suspension is "progressive discipline, including up to termination."[77] The employer consequently has the discretion to continue with progressive discipline or to discharge an employee who commits a fourth violation within six months of a one-shift suspension. In short, the facts are much different, and the discipline policies appear to have been different than those applicable to D.P. Moreover, review of D.P.'s disciplinary record as a whole does not support the conclusion that HCMC arbitrarily applied its disciplinary policies to Mr. Ostling. On the contrary, HCMC appears to have tolerated years of repeated, progressive discipline of both men in order to keep them in their jobs.

Fourth, the Veteran argues that the employer's action is unreasonable because at some point in 2011, after Mr. Ostling received the notice of discharge, the no call, no show policy was changed to allow a ten-minute grace period after the start of a shift. This change was made after discussions between HCMC and the paramedic union.[78] In effect, the Veteran argues that the change in policy demonstrates the unreasonableness of the rule in effect in 2010.

The record reflects that there have been several changes to the no call, no show policy over time. The previous policy, in effect between June 2000 and November 5, 2007, allowed a ten-minute grace period after the start of the shift, but called for discipline beginning with a written reprimand.[79] The policy in effect in 2010 reduced the initial discipline to a verbal reprimand for the same conduct but eliminated the ten-minute grace period.[80] The policy in effect during 2011 apparently resumes the use of a ten-minute grace period, but the record is silent as to whether the discipline commences with a verbal vs. written reprimand. It is thus unclear whether the policy has become more lenient or not. The fact that these policies have changed from time to time,

[75] Ex. V-6.
[76] Dennis Combs, the vice-president of the paramedic's union, testified that the policy effective in June 2000 (Ex. 5) was the same as the policy in effect in 1996, "as far as he knows." The 1996-97 disciplinary records relating to D.P. (Ex. V-6) reference discipline pursuant to Section C-1 of the Reporting to Work Policy; however, there is no section C-1 in the June 2000 policy. *See* Ex. 5. It is apparent that some different policy was in effect in 1996-97.
[77] Ex. 6.
[78] Test. of M. Van Buren; Test. of D. Gesme.
[79] Ex. 5.
[80] Ex. 6.

however, does not mitigate the violations that occurred under the policy applicable to Mr. Ostling. The job description requires him to report to work on time and to maintain all job standards for attendance, whatever they may be.

In addition, the Veteran argues that his alcoholism and use of medications in the fall of 2010 are an extenuating circumstance that should have been considered. Specifically, he contends that HCMC should have afforded him the opportunity to obtain in-patient treatment before deciding to discharge him. The ALJ concludes this argument is both factually and legally misplaced.

As a factual matter, the record is clear that, had Mr. Ostling ever requested a medical leave for the purpose of obtaining in-patient treatment, his request would have been accommodated. It is undisputed that both Mr. Van Buren and Mr. Gesme were personally supportive of chemical dependency treatment and viewed treatment as a positive step in the right direction. Mr. Gesme in particular has a reputation for being helpful and willing to work with people who need time off for personal matters. Mr. Ostling, however, expressly declined in-patient treatment when encouraged by a friend in 2002, and he declined medical leaves offered by his employer in 2002 and 2009. On December 3, 2010, when he knew his job was on the line, Mr. Ostling assured EMS management that he had been sober since his August hospitalization, and he made no request for time off to obtain treatment of any sort. He persisted in refusing to consider in-patient treatment until after he was fired.

With regard to the anti-anxiety, anti-depressant, or other medications Mr. Ostling took in the fall of 2010, it is unclear whether these medications actually contributed to a number of his absences from work. As noted in the findings above, it appears he did not plan to use these medications after September 15, 2010, or at least that was his treatment plan at the time. He advised a medical provider that he had stopped using the anti-anxiety medication by September 28, 2010, and that he would stop using Ambien on October 1, 2010. Mr. Ostling acknowledged in testimony that he was not using any medications on November 25, 2010, and he did not tell EMS management at any time prior to receiving the notice of intent to discharge that he was also using narcotic pain medications for a back problem.

As a legal matter, employees who are disabled by alcoholism are protected from discrimination based on their disability; however, employers are not obligated to accommodate alcoholism when it results in absences or other unacceptable conduct.[81] Moreover, accommodation is appropriate only where the employer knows the employee is disabled and is need of an accommodation.[82] EMS management was aware of Mr. Ostling's problems with alcohol, had encouraged him to obtain treatment, and commended him for seeking out-patient treatment in January 2010. In the December 3, 2010, meeting that preceded the decision to discharge him, however, Mr. Ostling represented to management that he had been sober since his relapse in August 2010

[81] *See Larson v. Koch Refining Co.*, 920 F. Supp. 1000, 1004 (D. Minn. 1996) (the patterned, short-notice absences of an alcoholic employee are not protected behavior).
[82] *Larson v. Koch Refining*, 920 F. Supp. at 1005.

and was attending AA meetings. He blamed his absences on drowsiness caused by medications, which he had stopped using. He did not request a leave for the purpose of obtaining in-patient treatment, or any other accommodation, at that time. He maintained the same position in the administrative hearing that took place in January 2011. If Mr. Ostling did not believe he needed in-patient treatment at the time, the employer was in no position to second-guess him.[83]

In *R.O. v. Hennepin County Medical Center*,[84] the employee went through an out-patient chemical dependency treatment program between June and August 1996. A personnel rule in effect at that time provided that, when an employee has a positive alcohol test result within two years following completion of a treatment program, the appointing authority may take whatever disciplinary action, including discharge, that is deemed appropriate. After a positive alcohol test in February 1997, the employee entered and completed in-patient treatment. After completion of the treatment program, but before he returned to work, he was discharged from employment based on the test result. In his appeal hearing, the Administrative Law Judge concluded that the County had obtained the test in violation of its policy on drug and alcohol testing and that the result could not be used to support his discharge. Moreover, the Administrative Law Judge concluded that, by refusing to let the employee return to work after completion of in-patient treatment, the County had failed to fully accommodate the in-patient treatment needed to address his disability.

Contrary to the Veteran's argument, neither this decision nor the case law upon which it is based support the proposition that HCMC was obligated to retain Mr. Ostling as an employee until such time as he decided it was appropriate to undergo in-patient chemical dependency treatment. In *Rogers v. Lehman*, 869 F.2d 253 (4th Cir. 1989), a federal employee was disciplined over a period of many years for chronic absenteeism. He subsequently voluntarily entered in-patient treatment, for which the employer granted a leave. The employee completed treatment and was terminated approximately three weeks later, on the basis of absenteeism that preceded treatment. Based on personnel policies applicable to federal employees, the court held that the employer did not adequately accommodate the treatment.[85] In *Fuller v. Frank*, 916 F.2d 558, 562 (9th Cir. 1990), however, the employer had assisted the employee in locating a treatment program and giving him time off to attend it. When the employee committed misconduct

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[83] *See Hill v. Kansas City Area Transportation Authority*, 181 F.3d 891 (8th Cir. 1999) (request for accommodation of medications that made employee drowsy were untimely when made after the misconduct justifying discharge occurred).

[84] OAH Docket No. 7-2120-11147-3 (Dec. 11, 1997). This report is not public, and the employee's name should not be used in any citation made in a public document.

[85] These policies, and the statutory basis for those policies, are further described in *Whitlock v. Donovan*, 598 F. Supp. 126 (D. D.C. 1984). Based on 42 U.S.C. § 290dd-1(a), federal employers were required to have alcoholism treatment programs for employees. Policies based on that requirement called for progressive steps, including a fitness-for-duty examination, before discharging an employee for conduct that might be related to alcohol use. *See* 598 F. Supp. at 130-34. In that case, the employer had failed to follow the proper procedures. The parties have pointed to no statute or policy containing comparable requirements for HCMC.

following completion of the treatment program, the court held that the employer's efforts had been reasonable and that no further accommodation was required.

Similarly, in *Teahan v. Metro North Commuter R.R. Co.*, 951 F.2d 511 (2d Cir. 1991), the employee had entered in-patient treatment before receiving notice of the discipline and returned to work after completion of treatment, with no subsequent misconduct occurring prior to the discharge becoming effective under the terms of the collective bargaining agreement. The court held that, in determining whether the employee was a "current user" of alcohol (which would have excluded him from coverage as an otherwise qualified employee under the Rehabilitation Act of 1973), the employee was not a current user of alcohol after his rehabilitation and thus he was an otherwise qualified employee.[86]

These cases provide no support for Mr. Ostling. Here, HCMC afforded Mr. Ostling the opportunity to obtain whatever treatment he desired. In December 2010, Mr. Ostling maintained, apparently untruthfully, that he was sober and needed nothing more. He waited until after receiving the notice of intent to terminate his employment to seek in-patient treatment. Based on this sequence of events, Mr. Ostling's use of alcohol does not provide an extenuating circumstance that militates in favor of mitigating the sanction.

Finally, the Veteran argues, citing *Crewe v. U.S. Office of Personnel Management,* 834 F.2d 140, 143 (8th Cir. 1987), that his post-termination rehabilitation is an extenuating circumstance that should mitigate the sanction. In *Crewe*, the issue was whether a federal agency had discriminated against an alcoholic who had been denied employment. The applicant had been through treatment many times. The court noted that rehabilitation efforts were relevant to the facial possibility of accommodation, but concluded the applicant had failed to prove the reasonableness of any accommodation. This is not a hiring case, and HCMC's hiring policies are not at issue.

The Administrative Law Judge agrees that, as of the time of the hearing, Mr. Ostling had done a remarkable job of responding to treatment. He appeared to have a great deal of insight into addiction and the behaviors and attitudes that flow from it. But the reasonableness of the employer's decision to discharge him, and the existence of any extenuating circumstances, should be evaluated based on the facts known at that time.[87] Mr. Ostling said that he had been sober since August and that his absences were not caused by alcohol. The employer could not know what Mr. Ostling would do in response to being given notice of discharge. At the time of the hearing, he had been out of treatment for four months while on paid leave. Even if post-termination rehabilitation could be considered an extenuating circumstance under the VPA, there is not substantial evidence in this record that the discipline should be modified.

K.D.S.

[86] The court denied the employee's request for reinstatement with back pay, but permitted him to reapply with the agency and undergo a fitness for duty examination pursuant to the federal policy.

[87] *Cf. City of Minneapolis v. Moe*, 450 N.W.2d 367, 370 (Minn. App. 1990) (after-the-fact chemical dependency treatment irrelevant to issue of good cause to discharge for gross misconduct).